STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2003
v	No. 240599 Oakland Circuit Court
EMMETT GOUCH, Defendant-Appellant.	LC No. 2001-181790-FH

Before: Fitzgerald, P.J., and Zahra and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree retail fraud, MCL 750.356c, and was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 2 ½ to fifteen years. Defendant appeals as of right. We affirm.

Defendant's conviction arises out of the theft of $549 worth of merchandise and would normally have constituted second-degree retail fraud. However, MCL 750.356c(2) provides for conviction of first-degree retail fraud for conduct that would otherwise constitute second-degree retail fraud if the defendant previously has been convicted of one of the offenses enumerated in the statute. Under the retail-fraud statute, first-degree retail fraud is a substantive offense and the "recidivist" element contained in subsection 2 is but one alternate way of committing first-degree retail fraud.

Defendant argues that the evidence was not sufficient to support a conviction of first-degree retail fraud because the prosecutor did not present evidence that defendant had the requisite prior conviction. Notably, defendant does not dispute that he has a prior retail fraud conviction. A defendant who is properly convicted of second-degree retail fraud and who has a prior retail fraud conviction is properly deemed guilty of first-degree retail fraud pursuant to § 356c(2). *People v Johnson*, 195 Mich App 571, 572, 575; 491 NW2d 622 (1992). Here, defense counsel requested before trial that evidence of defendant's prior convictions not be introduced to the jury for purposes of the enhanced sentencing provision of MCL 750.356c(4). Rather, evidence of the prior convictions was introduced at sentencing. Although defense counsel's comment referred to enhanced sentencing, it is clear that defense counsel did not want evidence of defendant's prior retail fraud convictions to be introduced to the jury. Defendant cannot assign error on appeal to something that his own counsel deemed proper at trial. "To do so would allow defendant to harbor error as an appellate parachute." *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

Defendant also argues that he was denied his right to counsel when the trial court refused to substitute retained counsel for court-appointed counsel. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). An abuse of discretion occurs when the resulting decision is so violative of fact and logic that it shows a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

Here, a representative of the retained counsel appeared roughly two hours after defendant's trial was to have begun, after the jury had been selected, and stated on the record that retained counsel was unprepared to try the case at that time. We find no abuse of discretion in the trial court's refusal to substitute counsel at that time because the substitution would have unreasonably disrupted the trial proceedings. *People v Flores*, 176 Mich App 610; 440 NW2d 47 (1989).

Defendant also claims that the evidence presented was insufficient to establish the element of intent. Viewed in a light most favorable to the prosecution, the evidence establishes that defendant entered the store, selected two leather coats, put them into a shopping cart, and pushed the shopping cart over to a woman that he had not previously acknowledged in the store. Defendant then left the store as the woman and another man removed the sensor tags from the two leather coats and another coat that she had placed in the cart. Defendant then left the store. As the man left the store with the bag of merchandise, the store's loss prevention officer approached him. The man dropped the bag, ran to defendant's vehicle, and got inside. Defendant then backed his vehicle up for the length of the parking lot before driving off at a high speed. This evidence was sufficient to allow a reasonable juror to infer that defendant intended the commission of the crime or knew that other persons intended its commission at the time of giving assistance. *People v Novack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Additionally, contrary to defendant's suggestions, evidence of flight, including fleeing the scene of the crime, was relevant to defendant's purpose and intent, *People v Clark*, 124 Mich App 410, 413; 335 NW2d 53 (1983), and was admissible to show consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001).

Defendant argues that his minimum sentence of 2-1/2 years as an habitual offender, fourth offense, was excessive. The sentence was within the sentencing guidelines' recommended range of seven to forty-six months. Accordingly, we have no authority to remand for resentencing. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).[1]

[1] Although defendant refers to his sentence as constituting cruel and unusual punishment, his argument is couched more in terms of the sentence imposed being disproportionate. In any event, to the extent that defendant does, in fact, raise a constitutional argument with respect to minimum sentence, he has failed to make the requisite showing to demonstrate a constitutional violation.

Defendant also argues that he was entitled to 112 instead of 111 days of credit for time served in jail. Because defendant did not object below to an award of 111 days of sentence credit, the plain error standard applies to this claim of unpreserved error. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

Defendant was arrested on November 7, 2001, and was sentenced on February 26, 2002. Defendant contends that he is entitled to an additional one day of credit for the sentencing date of February 26. We disagree. According to the judgment of sentence, defendant's sentence began on February 26, and he was given credit for 111 days. Awarding sentence credit from the date of defendant's arrest on November 7, 2001, to the date he was sentenced, the date designated as the "date sentence begins," defendant was entitled to 111 days' credit.

Having found no errors, we reject defendant's claim that a multiplicity of errors deprived him of a fundamentally fair trial to be without merit. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Similarly, defendant's contention that his trial counsel was ineffective for failing to raise at trial the issues defendant raises in his supplemental appellate brief is without merit because trial counsel is not required to advocate meritless positions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood